

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Plaintiff,

v.

Defendant.

Case No. C

PATENT LOCAL RULE 2-2 INTERIM
MODEL PROTECTIVE ORDER

1. PURPOSES AND LIMITATIONS

Disclosure and discovery activity in this action are likely to involve production of confidential, proprietary, or private information for which special protection from public disclosure and from use for any purpose other than prosecuting this litigation may be warranted. Accordingly, the parties hereby stipulate to and petition the court to enter the following Stipulated Protective Order. The parties acknowledge that this Order does not confer blanket protections on all disclosures or responses to discovery and that the protection it affords from public disclosure and use extends only to the limited information or items that are entitled to confidential treatment under the applicable legal principles. The parties further acknowledge, as set forth in Section 14.4 below, that this Stipulated Protective Order does not entitle them to file confidential information under seal; Civil Local Rule 79-5 sets forth the procedures that must be followed and

1 the standards that will be applied when a party seeks permission from the court to file material
2 under seal.

3 2. DEFINITIONS

4 2.1 Challenging Party: a Party or Non-Party that challenges the designation of
5 information or items under this Order.

6 2.2 “CONFIDENTIAL” Information or Items: information (regardless of how
7 it is generated, stored or maintained) or tangible things that qualify for protection under Federal
8 Rule of Civil Procedure 26(c).

9 2.3 Counsel (without qualifier): Outside Counsel of Record and House
10 Counsel (as well as their support staff).

11 2.4 Designated House Counsel: House Counsel who seek access to “HIGHLY
12 CONFIDENTIAL – ATTORNEYS’ EYES ONLY” information in this matter.

13 2.5 Designating Party: a Party or Non-Party that designates information or
14 items that it produces in disclosures or in responses to discovery as “CONFIDENTIAL,”
15 “HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY,” or “HIGHLY CONFIDENTIAL
16 – SOURCE CODE.”

17 2.6 Disclosure or Discovery Material: all items or information, regardless of
18 the medium or manner in which it is generated, stored, or maintained (including, among other
19 things, testimony, transcripts, and tangible things), that are produced or generated in disclosures
20 or responses to discovery in this matter.

21 2.7 Expert: a person with specialized knowledge or experience in a matter
22 pertinent to the litigation who (1) has been retained by a Party or its counsel to serve as an expert
23 witness or as a consultant in this action, (2) is not a past or current employee of a Party or of a
24 Party's competitor, and (3) at the time of retention, is not anticipated to become an employee of a
25 Party or of a Party's competitor.

26 2.8 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”
27 Information or Items: extremely sensitive “Confidential Information or Items,” disclosure of
28 which to another Party or Non-Party would create a substantial risk of serious harm that could not

1 be avoided by less restrictive means.

2 2.9 “HIGHLY CONFIDENTIAL – SOURCE CODE” Information or Items:
3 extremely sensitive “Confidential Information or Items” representing computer code and
4 associated comments and revision histories, formulas, engineering specifications, or schematics
5 that define or otherwise describe in detail the algorithms or structure of software or hardware
6 designs, disclosure of which to another Party or Non-Party would create a substantial risk of
7 serious harm that could not be avoided by less restrictive means.

8 2.10 House Counsel: attorneys who are employees of a party to this action.
9 House Counsel does not include Outside Counsel of Record or any other outside counsel.

10 2.11 Non-Party: any natural person, partnership, corporation, association, or
11 other legal entity not named as a Party to this action.

12 2.12 Outside Counsel of Record: attorneys who are not employees of a party to
13 this action but are retained to represent or advise a party to this action and have appeared in this
14 action on behalf of that party or are affiliated with a law firm which has appeared on behalf of
15 that party.

16 2.13 Party: any party to this action, including all of its officers, directors,
17 employees, consultants, retained experts, and Outside Counsel of Record (and their support
18 staffs).

19 2.14 Producing Party: a Party or Non-Party that produces Disclosure or
20 Discovery Material in this action.

21 2.15 Professional Vendors: persons or entities that provide litigation support
22 services (e.g., photocopying, videotaping, translating, preparing exhibits or demonstrations, and
23 organizing, storing, or retrieving data in any form or medium) and their employees and
24 subcontractors.

25 2.16 Protected Material: any Disclosure or Discovery Material that is
26 designated as “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES
27 ONLY,” or “HIGHLY CONFIDENTIAL – SOURCE CODE.”

28 2.17 Receiving Party: a Party that receives Disclosure or Discovery Material

1 from a Producing Party.

2 3. SCOPE

3 The protections conferred by this Stipulation and Order cover not only Protected
4 Material (as defined above), but also (1) any information copied or extracted from Protected
5 Material; (2) all copies, excerpts, summaries, or compilations of Protected Material; and (3) any
6 testimony, conversations, or presentations by Parties or their Counsel that might reveal Protected
7 Material. However, the protections conferred by this Stipulation and Order do not cover the
8 following information: (a) any information that is in the public domain at the time of disclosure
9 to a Receiving Party or becomes part of the public domain after its disclosure to a Receiving Party
10 as a result of publication not involving a violation of this Order, including becoming part of the
11 public record through trial or otherwise; and (b) any information known to the Receiving Party
12 prior to the disclosure or obtained by the Receiving Party after the disclosure from a source who
13 obtained the information lawfully and under no obligation of confidentiality to the Designating
14 Party. Any use of Protected Material at trial shall be governed by a separate agreement or order.

15 4. DURATION

16 Even after final disposition of this litigation, the confidentiality obligations
17 imposed by this Order shall remain in effect until a Designating Party agrees otherwise in writing
18 or a court order otherwise directs. Final disposition shall be deemed to be the later of (1)
19 dismissal of all claims and defenses in this action, with or without prejudice; and (2) final
20 judgment herein after the completion and exhaustion of all appeals, rehearings, remands, trials, or
21 reviews of this action, including the time limits for filing any motions or applications for
22 extension of time pursuant to applicable law.

23 5. DESIGNATING PROTECTED MATERIAL

24 5.1 Exercise of Restraint and Care in Designating Material for Protection.

25 Each Party or Non-Party that designates information or items for protection under this Order must
26 take care to limit any such designation to specific material that qualifies under the appropriate
27 standards. To the extent it is practical to do so, the Designating Party must designate for
28 protection only those parts of material, documents, items, or oral or written communications that

1 qualify – so that other portions of the material, documents, items, or communications for which
2 protection is not warranted are not swept unjustifiably within the ambit of this Order.

3 Mass, indiscriminate, or routinized designations are prohibited. Designations that
4 are shown to be clearly unjustified or that have been made for an improper purpose (e.g., to
5 unnecessarily encumber or retard the case development process or to impose unnecessary
6 expenses and burdens on other parties) expose the Designating Party to sanctions.

7 If it comes to a Designating Party's attention that information or items that it
8 designated for protection do not qualify for protection at all or do not qualify for the level of
9 protection initially asserted, that Designating Party must promptly notify all other Parties that it is
10 withdrawing the mistaken designation.

11 5.2 Manner and Timing of Designations. Except as otherwise provided in this
12 Order (see, e.g., second paragraph of section 5.2(a) below), or as otherwise stipulated or ordered,
13 Disclosure or Discovery Material that qualifies for protection under this Order must be clearly so
14 designated before the material is disclosed or produced.

15 Designation in conformity with this Order requires:

16 (a) for information in documentary form (e.g., paper or electronic documents, but
17 excluding transcripts of depositions or other pretrial or trial proceedings), that the Producing
18 Party affix the legend "CONFIDENTIAL," "HIGHLY CONFIDENTIAL – ATTORNEYS'
19 EYES ONLY," or "HIGHLY CONFIDENTIAL – SOURCE CODE" to each page that contains
20 protected material. If only a portion or portions of the material on a page qualifies for protection,
21 the Producing Party also must clearly identify the protected portion(s) (e.g., by making
22 appropriate markings in the margins) and must specify, for each portion, the level of protection
23 being asserted.

24 A Party or Non-Party that makes original documents or materials available for
25 inspection need not designate them for protection until after the inspecting Party has indicated
26 which material it would like copied and produced. During the inspection and before the
27 designation, all of the material made available for inspection shall be deemed "HIGHLY
28 CONFIDENTIAL – ATTORNEYS' EYES ONLY." After the inspecting Party has identified the

1 documents it wants copied and produced, the Producing Party must determine which documents,
2 or portions thereof, qualify for protection under this Order. Then, before producing the specified
3 documents, the Producing Party must affix the appropriate legend (“CONFIDENTIAL,”
4 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” or “HIGHLY CONFIDENTIAL
5 – SOURCE CODE”) to each page that contains Protected Material. If only a portion or portions
6 of the material on a page qualifies for protection, the Producing Party also must clearly identify
7 the protected portion(s) (e.g., by making appropriate markings in the margins) and must specify,
8 for each portion, the level of protection being asserted.

9 (b) for testimony given in deposition or in other pretrial or trial proceedings, that
10 the Designating Party identify on the record, before the close of the deposition, hearing, or other
11 proceeding, all protected testimony and specify the level of protection being asserted. When it is
12 impractical to identify separately each portion of testimony that is entitled to protection and it
13 appears that substantial portions of the testimony may qualify for protection, the Designating
14 Party may invoke on the record (before the deposition, hearing, or other proceeding is concluded)
15 a right to have up to 21 days to identify the specific portions of the testimony as to which
16 protection is sought and to specify the level of protection being asserted. Only those portions of
17 the testimony that are appropriately designated for protection within the 21 days shall be covered
18 by the provisions of this Stipulated Protective Order. Alternatively, a Designating Party may
19 specify, at the deposition or up to 21 days afterwards if that period is properly invoked, that the
20 entire transcript shall be treated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL –
21 ATTORNEYS’ EYES ONLY.”

22 Parties shall give the other parties notice if they reasonably expect a deposition,
23 hearing, or other proceeding to include Protected Material so that the other parties can ensure that
24 only authorized individuals who have signed the “Acknowledgment and Agreement to Be
25 Bound” (Exhibit A) are present at those proceedings. The use of a document as an exhibit at a
26 deposition shall not in any way affect its designation as “CONFIDENTIAL” or “HIGHLY
27 CONFIDENTIAL – ATTORNEYS’ EYES ONLY.”

28 Transcripts containing Protected Material shall have an obvious legend on the title

1 page that the transcript contains Protected Material, and the title page shall be followed by a list
2 of all pages (including line numbers as appropriate) that have been designated as Protected
3 Material and the level of protection being asserted by the Designating Party. The Designating
4 Party shall inform the court reporter of these requirements. Any transcript that is prepared before
5 the expiration of a 21-day period for designation shall be treated during that period as if it had
6 been designated “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” in its entirety
7 unless otherwise agreed. After the expiration of that period, the transcript shall be treated only as
8 actually designated.

9 (c) for information produced in some form other than documentary and for any
10 other tangible items, that the Producing Party affix in a prominent place on the exterior of the
11 container or containers in which the information or item is stored the legend “CONFIDENTIAL,”
12 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” or “HIGHLY CONFIDENTIAL
13 – SOURCE CODE.” If only a portion or portions of the information or item warrant protection,
14 the Producing Party, to the extent practicable, shall identify the protected portion(s) and specify
15 the level of protection being asserted.

16 5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent
17 failure to designate qualified information or items does not, standing alone, waive the Designating
18 Party’s right to secure protection under this Order for such material. Upon timely correction of a
19 designation, the Receiving Party must make reasonable efforts to assure that the material is
20 treated in accordance with the provisions of this Order.

21 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

22 6.1 Timing of Challenges. Any Party or Non-Party may challenge a
23 designation of confidentiality at any time. Unless a prompt challenge to a Designating Party’s
24 confidentiality designation is necessary to avoid foreseeable, substantial unfairness, unnecessary
25 economic burdens, or a significant disruption or delay of the litigation, a Party does not waive its
26 right to challenge a confidentiality designation by electing not to mount a challenge promptly
27 after the original designation is disclosed.

28 6.2 Meet and Confer. The Challenging Party shall initiate the dispute

1 resolution process by providing written notice of each designation it is challenging and describing
2 the basis for each challenge. To avoid ambiguity as to whether a challenge has been made, the
3 written notice must recite that the challenge to confidentiality is being made in accordance with
4 this specific paragraph of the Protective Order. The parties shall attempt to resolve each
5 challenge in good faith and must begin the process by conferring directly (in voice to voice
6 dialogue; other forms of communication are not sufficient) within 14 days of the date of service
7 of notice. In conferring, the Challenging Party must explain the basis for its belief that the
8 confidentiality designation was not proper and must give the Designating Party an opportunity to
9 review the designated material, to reconsider the circumstances, and, if no change in designation
10 is offered, to explain the basis for the chosen designation. A Challenging Party may proceed to
11 the next stage of the challenge process only if it has engaged in this meet and confer process first
12 or establishes that the Designating Party is unwilling to participate in the meet and confer process
13 in a timely manner.

14 6.3 Judicial Intervention. If the Parties cannot resolve a challenge without
15 court intervention, the Designating Party shall file and serve a motion to retain confidentiality
16 under Civil Local Rule 7 (and in compliance with Civil Local Rule 79-5, if applicable) within 21
17 days of the initial notice of challenge or within 14 days of the parties agreeing that the meet and
18 confer process will not resolve their dispute, whichever is earlier. Each such motion must be
19 accompanied by a competent declaration affirming that the movant has complied with the meet
20 and confer requirements imposed in the preceding paragraph. Failure by the Designating Party to
21 make such a motion including the required declaration within 21 days (or 14 days, if applicable)
22 shall automatically waive the confidentiality designation for each challenged designation. In
23 addition, the Challenging Party may file a motion challenging a confidentiality designation at any
24 time if there is good cause for doing so, including a challenge to the designation of a deposition
25 transcript or any portions thereof. Any motion brought pursuant to this provision must be
26 accompanied by a competent declaration affirming that the movant has complied with the meet
27 and confer requirements imposed by the preceding paragraph.

28 The burden of persuasion in any such challenge proceeding shall be on the

1 Designating Party. Frivolous challenges and those made for an improper purpose (e.g., to harass
2 or impose unnecessary expenses and burdens on other parties) may expose the Challenging Party
3 to sanctions. Unless the Designating Party has waived the confidentiality designation by failing
4 to file a motion to retain confidentiality as described above, all parties shall continue to afford the
5 material in question the level of protection to which it is entitled under the Producing Party's
6 designation until the court rules on the challenge.

7 7. ACCESS TO AND USE OF PROTECTED MATERIAL

8 7.1 Basic Principles. A Receiving Party may use Protected Material that is
9 disclosed or produced by another Party or by a Non-Party in connection with this case only for
10 prosecuting, defending, or attempting to settle this litigation. Such Protected Material may be
11 disclosed only to the categories of persons and under the conditions described in this Order.
12 When the litigation has been terminated, a Receiving Party must comply with the provisions of
13 section 15 below (FINAL DISPOSITION).

14 Protected Material must be stored and maintained by a Receiving Party at a
15 location and in a secure manner that ensures that access is limited to the persons authorized under
16 this Order.

17 7.2 Disclosure of "CONFIDENTIAL" Information or Items. Unless otherwise
18 ordered by the court or permitted in writing by the Designating Party, a Receiving Party may
19 disclose any information or item designated "CONFIDENTIAL" only to:

20 (a) the Receiving Party's Outside Counsel of Record in this action, as well as
21 employees of said Outside Counsel of Record to whom it is reasonably necessary to disclose the
22 information for this litigation and who have signed the "Acknowledgment and Agreement to Be
23 Bound" that is attached hereto as Exhibit A;

24 (b) the officers, directors, and employees (including House Counsel) of the
25 Receiving Party to whom disclosure is reasonably necessary for this litigation and who have
26 signed the "Acknowledgment and Agreement to Be Bound" (Exhibit A);

27 (c) Experts (as defined in this Order) of the Receiving Party to whom disclosure is
28 reasonably necessary for this litigation and who have signed the "Acknowledgment and

1 Agreement to Be Bound” (Exhibit A);

2 (d) the court and its personnel;

3 (e) court reporters and their staff, professional jury or trial consultants, and
4 Professional Vendors to whom disclosure is reasonably necessary for this litigation and who have
5 signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A);

6 (f) during their depositions, witnesses in the action to whom disclosure is
7 reasonably necessary and who have signed the “Acknowledgment and Agreement to Be Bound”
8 (Exhibit A), unless otherwise agreed by the Designating Party or ordered by the court. Pages of
9 transcribed deposition testimony or exhibits to depositions that reveal Protected Material must be
10 separately bound by the court reporter and may not be disclosed to anyone except as permitted
11 under this Stipulated Protective Order.

12 (g) the author or recipient of a document containing the information or a custodian
13 or other person who otherwise possessed or knew the information.

14 7.3 Disclosure of “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES
15 ONLY” and “HIGHLY CONFIDENTIAL – SOURCE CODE” Information or Items. Unless
16 otherwise ordered by the court or permitted in writing by the Designating Party, a Receiving
17 Party may disclose any information or item designated “HIGHLY CONFIDENTIAL –
18 ATTORNEYS’ EYES ONLY” or “HIGHLY CONFIDENTIAL – SOURCE CODE” only to:

19 (a) the Receiving Party’s Outside Counsel of Record in this action, as well as
20 employees of said Outside Counsel of Record to whom it is reasonably necessary to disclose the
21 information for this litigation and who have signed the “Acknowledgment and Agreement to Be
22 Bound” that is attached hereto as Exhibit A;

23 (b) Designated House Counsel of the Receiving Party (1) who has no involvement
24 in competitive decision-making, (2) to whom disclosure is reasonably necessary for this litigation,
25 (3) who has signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A), and (4) as to
26 whom the procedures set forth in paragraph 7.4(a)(1), below, have been followed;¹

27
28 ¹ This Order contemplates that Designated House Counsel shall not have access to any
information or items designated “HIGHLY CONFIDENTIAL – SOURCE CODE.”

1 (c) Experts of the Receiving Party (1) to whom disclosure is reasonably necessary
2 for this litigation, (2) who have signed the “Acknowledgment and Agreement to Be Bound”
3 (Exhibit A), and (3) as to whom the procedures set forth in paragraph 7.4(a)(2), below, have been
4 followed;

5 (d) the court and its personnel;

6 (e) court reporters and their staff, professional jury or trial consultants, and
7 Professional Vendors to whom disclosure is reasonably necessary for this litigation and who have
8 signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A); and

9 (f) the author or recipient of a document containing the information or a custodian
10 or other person who otherwise possessed or knew the information.

11 7.4 Procedures for Approving or Objecting to Disclosure of “HIGHLY
12 CONFIDENTIAL – ATTORNEYS’ EYES ONLY” or “HIGHLY CONFIDENTIAL – SOURCE
13 CODE” Information or Items to Designated House Counsel or Experts.

14 (a)(1) Unless otherwise ordered by the court or agreed to in writing by the
15 Designating Party, a Party that seeks to disclose to Designated House Counsel any information or
16 item that has been designated “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”
17 pursuant to paragraph 7.3(b) first must make a written request to the Designating Party that (1)
18 sets forth the full name of the Designated House Counsel and the city and state of his or her
19 residence and (2) describes the Designated House Counsel’s current and reasonably foreseeable
20 future primary job duties and responsibilities in sufficient detail to determine if House Counsel is
21 involved, or may become involved, in any competitive decision-making.

22 (a)(2) Unless otherwise ordered by the court or agreed to in writing by the
23 Designating Party, a Party that seeks to disclose to an Expert (as defined in this Order) any
24 information or item that has been designated “HIGHLY CONFIDENTIAL – ATTORNEYS’
25 EYES ONLY” or “HIGHLY CONFIDENTIAL – SOURCE CODE” pursuant to paragraph 7.3(c)
26 first must make a written request to the Designating Party that (1) identifies the general categories
27 of “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” or “HIGHLY
28 CONFIDENTIAL – SOURCE CODE” information that the Receiving Party seeks permission to

1 disclose to the Expert, (2) sets forth the full name of the Expert and the city and state of his or her
2 primary residence, (3) attaches a copy of the Expert's current resume, (4) identifies the Expert's
3 current employer(s), (5) identifies each person or entity from whom the Expert has received
4 compensation or funding for work in his or her areas of expertise or to whom the expert has
5 provided professional services, including in connection with a litigation, at any time during the
6 preceding five years,² and (6) identifies (by name and number of the case, filing date, and location
7 of court) any litigation in connection with which the Expert has offered expert testimony,
8 including through a declaration, report, or testimony at a deposition or trial, during the preceding
9 five years.

10 (b) A Party that makes a request and provides the information specified in the
11 preceding respective paragraphs may disclose the subject Protected Material to the identified
12 Designated House Counsel or Expert unless, within 14 days of delivering the request, the Party
13 receives a written objection from the Designating Party. Any such objection must set forth in
14 detail the grounds on which it is based.

15 (c) A Party that receives a timely written objection must meet and confer with the
16 Designating Party (through direct voice to voice dialogue) to try to resolve the matter by
17 agreement within seven days of the written objection. If no agreement is reached, the Party
18 seeking to make the disclosure to Designated House Counsel or the Expert may file a motion as
19 provided in Civil Local Rule 7 (and in compliance with Civil Local Rule 79-5, if applicable)
20 seeking permission from the court to do so. Any such motion must describe the circumstances
21 with specificity, set forth in detail the reasons why disclosure to Designated House Counsel or the
22 Expert is reasonably necessary, assess the risk of harm that the disclosure would entail, and
23 suggest any additional means that could be used to reduce that risk. In addition, any such motion
24 must be accompanied by a competent declaration describing the parties' efforts to resolve the
25 matter by agreement (i.e., the extent and the content of the meet and confer discussions) and
26

27 ² If the Expert believes any of this information is subject to a confidentiality obligation to a third-
28 party, then the Expert should provide whatever information the Expert believes can be disclosed
without violating any confidentiality agreements, and the Party seeking to disclose to the Expert
shall be available to meet and confer with the Designating Party regarding any such engagement.

1 setting forth the reasons advanced by the Designating Party for its refusal to approve the
2 disclosure.

3 In any such proceeding, the Party opposing disclosure to Designated House
4 Counsel or the Expert shall bear the burden of proving that the risk of harm that the disclosure
5 would entail (under the safeguards proposed) outweighs the Receiving Party's need to disclose
6 the Protected Material to its Designated House Counsel or Expert.

7 8. PROSECUTION BAR

8 Absent written consent from the Producing Party, any individual who receives
9 access to "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" or "HIGHLY
10 CONFIDENTIAL – SOURCE CODE" information shall not be involved in the prosecution of
11 patents or patent applications relating to [insert subject matter of the invention and of highly
12 confidential technical information to be produced], including without limitation the patents
13 asserted in this action and any patent or application claiming priority to or otherwise related to the
14 patents asserted in this action, before any foreign or domestic agency, including the United States
15 Patent and Trademark Office ("the Patent Office"). For purposes of this paragraph, "prosecution"
16 includes directly or indirectly drafting, amending, advising, or otherwise affecting the scope or
17 maintenance of patent claims.³ To avoid any doubt, "prosecution" as used in this paragraph does
18 not include representing a party challenging a patent before a domestic or foreign agency
19 (including, but not limited to, a reissue protest, *ex parte* reexamination or *inter partes*
20 reexamination). This Prosecution Bar shall begin when access to "HIGHLY CONFIDENTIAL –
21 ATTORNEYS' EYES ONLY" or "HIGHLY CONFIDENTIAL – SOURCE CODE" information
22 is first received by the affected individual and shall end two (2) years after final termination of
23 this action.

24 9. SOURCE CODE

25 (a) To the extent production of source code becomes necessary in this case, a
26 Producing Party may designate source code as "HIGHLY CONFIDENTIAL – SOURCE CODE"
27 if it comprises or includes confidential, proprietary or trade secret source code.

28 ³ Prosecution includes, for example, original prosecution, reissue and reexamination proceedings.

1 (b) Protected Material designated as “HIGHLY CONFIDENTIAL – SOURCE
2 CODE” shall be subject to all of the protections afforded to “HIGHLY CONFIDENTIAL –
3 ATTORNEYS’ EYES ONLY” information, including the Prosecution Bar set forth in Paragraph
4 8, and may be disclosed only to the individuals to whom “HIGHLY CONFIDENTIAL –
5 ATTORNEYS’ EYES ONLY” information may be disclosed, as set forth in Paragraphs 7.3 and
6 7.4, with the exception of Designated House Counsel.

7 (c) Any source code produced in discovery shall be made available for
8 inspection, in a format allowing it to be reasonably reviewed and searched, during normal
9 business hours or at other mutually agreeable times, at an office of the Producing Party’s counsel
10 or another mutually agreed upon location. The source code shall be made available for inspection
11 on a secured computer in a secured room without Internet access or network access to other
12 computers, and the Receiving Party shall not copy, remove, or otherwise transfer any portion of
13 the source code onto any recordable media or recordable device. The Producing Party may
14 visually monitor the activities of the Receiving Party’s representatives during any source code
15 review, but only to ensure that there is no unauthorized recording, copying, or transmission of the
16 source code.

17 (d) The Receiving Party may request paper copies of limited portions of source
18 code that are reasonably necessary for the preparation of court filings, pleadings, expert reports,
19 or other papers, or for deposition or trial, but shall not request paper copies for the purpose of
20 reviewing the source code other than electronically as set forth in paragraph (c) in the first
21 instance. The Producing Party shall provide all such source code in paper form, including bates
22 numbers and the label “HIGHLY CONFIDENTIAL – SOURCE CODE.” The Producing Party
23 may challenge the amount of source code requested in hard copy form pursuant to the dispute
24 resolution procedure and timeframes set forth in Paragraph 6 whereby the Producing Party is the
25 “Challenging Party” and the Receiving Party is the “Designating Party” for purposes of dispute
26 resolution.

27 (e) The Receiving Party shall maintain a record of any individual who has
28 inspected any portion of the source code in electronic or paper form. The Receiving Party shall

1 maintain all paper copies of any printed portions of the source code in a secured, locked area.
2 The Receiving Party shall not create any electronic or other images of the paper copies and shall
3 not convert any of the information contained in the paper copies into any electronic format. The
4 Receiving Party shall only make additional paper copies if such additional copies are (1)
5 necessary to prepare court filings, pleadings, or other papers (including a testifying expert's
6 expert report), (2) necessary for deposition, or (3) otherwise necessary for the preparation of its
7 case. Any paper copies used during a deposition shall be retrieved by the Producing Party at the
8 end of each day and must not be given to or left with a court reporter or any other unauthorized
9 individual.

10 10. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN
11 OTHER LITIGATION

12 If a Party is served with a subpoena or a court order issued in other litigation that
13 compels disclosure of any information or items designated in this action as "CONFIDENTIAL,"
14 "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY," or "HIGHLY CONFIDENTIAL
15 – SOURCE CODE," that Party must:

16 (a) promptly notify in writing the Designating Party. Such notification shall
17 include a copy of the subpoena or court order;

18 (b) promptly notify in writing the party who caused the subpoena or order to issue
19 in the other litigation that some or all of the material covered by the subpoena or order is subject
20 to this Protective Order. Such notification shall include a copy of this Stipulated Protective
21 Order; and

22 (c) cooperate with respect to all reasonable procedures sought to be pursued by
23 the Designating Party whose Protected Material may be affected.⁴

24 If the Designating Party timely seeks a protective order, the Party served with the
25 subpoena or court order shall not produce any information designated in this action as
26 "CONFIDENTIAL," "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY." or

27 ⁴ The purpose of imposing these duties is to alert the interested parties to the existence of this
28 Protective Order and to afford the Designating Party in this case an opportunity to try to protect
its confidentiality interests in the court from which the subpoena or order issued.

1 “HIGHLY CONFIDENTIAL – SOURCE CODE” before a determination by the court from
2 which the subpoena or order issued, unless the Party has obtained the Designating Party’s
3 permission. The Designating Party shall bear the burden and expense of seeking protection in
4 that court of its confidential material – and nothing in these provisions should be construed as
5 authorizing or encouraging a Receiving Party in this action to disobey a lawful directive from
6 another court.

7 11. A NON-PARTY’S PROTECTED MATERIAL SOUGHT TO BE
8 PRODUCED IN THIS LITIGATION

9 (a) The terms of this Order are applicable to information produced by a Non-
10 Party in this action and designated as “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL –
11 ATTORNEYS’ EYES ONLY,” or “HIGHLY CONFIDENTIAL – SOURCE CODE.” Such
12 information produced by Non-Parties in connection with this litigation is protected by the
13 remedies and relief provided by this Order. Nothing in these provisions should be construed as
14 prohibiting a Non-Party from seeking additional protections.

15 (b) In the event that a Party is required, by a valid discovery request, to
16 produce a Non-Party’s confidential information in its possession, and the Party is subject to an
17 agreement with the Non-Party not to produce the Non-Party’s confidential information, then the
18 Party shall:

19 1. promptly notify in writing the Requesting Party and the Non-Party
20 that some or all of the information requested is subject to a confidentiality agreement with a Non-
21 Party;

22 2. promptly provide the Non-Party with a copy of the Stipulated
23 Protective Order in this litigation, the relevant discovery request(s), and a reasonably specific
24 description of the information requested; and

25 3. make the information requested available for inspection by the
26 Non-Party.

27 (c) If the Non-Party fails to object or seek a protective order from this court
28 within 14 days of receiving the notice and accompanying information, the Receiving Party may

1 produce the Non-Party's confidential information responsive to the discovery request. If the
2 Non-Party timely seeks a protective order, the Receiving Party shall not produce any information
3 in its possession or control that is subject to the confidentiality agreement with the Non-Party
4 before a determination by the court.⁵ Absent a court order to the contrary, the Non-Party shall
5 bear the burden and expense of seeking protection in this court of its Protected Material.

6 12. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

7 If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed
8 Protected Material to any person or in any circumstance not authorized under this Stipulated
9 Protective Order, the Receiving Party must immediately (a) notify in writing the Designating
10 Party of the unauthorized disclosures, (b) use its best efforts to retrieve all unauthorized copies of
11 the Protected Material, (c) inform the person or persons to whom unauthorized disclosures were
12 made of all the terms of this Order, and (d) request such person or persons to execute the
13 "Acknowledgment and Agreement to Be Bound" that is attached hereto as Exhibit A.

14 13. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE
15 PROTECTED MATERIAL

16 When a Producing Party gives notice to Receiving Parties that certain
17 inadvertently produced material is subject to a claim of privilege or other protection, the
18 obligations of the Receiving Parties are those set forth in Federal Rule of Civil Procedure
19 26(b)(5)(B). This provision is not intended to modify whatever procedure may be established in
20 an e-discovery order that provides for production without prior privilege review. Pursuant to
21 Federal Rule of Evidence 502(d) and (e), insofar as the parties reach an agreement on the effect of
22 disclosure of a communication or information covered by the attorney-client privilege or work
23 product protection, the parties may incorporate their agreement in the stipulated protective order
24 submitted to the court.

25 14. MISCELLANEOUS

26 14.1 Right to Further Relief. Nothing in this Order abridges the right of any

27 ⁵ The purpose of this provision is to alert the interested parties to the existence of confidentiality
28 rights of a Non-Party and to afford the Non-Party an opportunity to protect its confidentiality
interests in this court.

1 person to seek its modification by the court in the future.

2 14.2 Right to Assert Other Objections. By stipulating to the entry of this
3 Protective Order no Party waives any right it otherwise would have to object to disclosing or
4 producing any information or item on any ground not addressed in this Stipulated Protective
5 Order. Similarly, no Party waives any right to object on any ground to use in evidence of any of
6 the material covered by this Protective Order.

7 14.3 Export Control. Disclosure of Protected Material shall be subject to all
8 applicable laws and regulations relating to the export of technical data contained in such
9 Protected Material, including the release of such technical data to foreign persons or nationals in
10 the United States or elsewhere. The Producing Party shall be responsible for identifying any such
11 controlled technical data, and the Receiving Party shall take measures necessary to ensure
12 compliance.

13 14.4 Filing Protected Material. Without written permission from the
14 Designating Party or a court order secured after appropriate notice to all interested persons, a
15 Party may not file in the public record in this action any Protected Material. A Party that seeks to
16 file under seal any Protected Material must comply with Civil Local Rule 79-5. Protected
17 Material may only be filed under seal pursuant to a court order authorizing the sealing of the
18 specific Protected Material at issue. Pursuant to Civil Local Rule 79-5, a sealing order will issue
19 only upon a request establishing that the Protected Material at issue is privileged, protectable as a
20 trade secret, or otherwise entitled to protection under the law. If a Receiving Party's request to
21 file Protected Material under seal pursuant to Civil Local Rule 79-5(d) is denied by the court, then
22 the Receiving Party may file the Protected Material in the public record pursuant to Civil Local
23 Rule 79-5(e) unless otherwise instructed by the court.

24 15. FINAL DISPOSITION

25 Within 60 days after the final disposition of this action, as defined in paragraph 4,
26 each Receiving Party must return all Protected Material to the Producing Party or destroy such
27 material. As used in this subdivision, "all Protected Material" includes all copies, abstracts,
28 compilations, summaries, and any other format reproducing or capturing any of the Protected

1 Material. Whether the Protected Material is returned or destroyed, the Receiving Party must
2 submit a written certification to the Producing Party (and, if not the same person or entity, to the
3 Designating Party) by the 60 day deadline that (1) identifies (by category, where appropriate) all
4 the Protected Material that was returned or destroyed and (2) affirms that the Receiving Party has
5 not retained any copies, abstracts, compilations, summaries or any other format reproducing or
6 capturing any of the Protected Material. Notwithstanding this provision, Counsel are entitled to
7 retain an archival copy of all pleadings, motion papers, trial, deposition, and hearing transcripts,
8 legal memoranda, correspondence, deposition and trial exhibits, expert reports, attorney work
9 product, and consultant and expert work product, even if such materials contain Protected
10 Material. Any such archival copies that contain or constitute Protected Material remain subject to
11 this Protective Order as set forth in Section 4 (DURATION).

12
13
14 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

15
16 DATED: _____
Attorneys for Plaintiff

17
18 DATED: _____
Attorneys for Defendant

19
20 PURSUANT TO STIPULATION, IT IS SO ORDERED.

21
22 DATED: _____
[Name of Judge]
United States District/Magistrate Judge
23
24
25
26
27
28

1 EXHIBIT A

2 ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

3 I, _____ [print or type full name], of
4 _____ [print or type full address], declare under penalty of perjury that I have read
5 in its entirety and understand the Stipulated Protective Order that was issued by the United States
6 District Court for the Northern District of California on _____ [date] in the case of
7 _____ [insert formal name of the case and the number and initials assigned to it by
8 the court]. I agree to comply with and to be bound by all the terms of this Stipulated Protective
9 Order, and I understand and acknowledge that failure to so comply could expose me to sanctions
10 and punishment in the nature of contempt. I solemnly promise that I will not disclose in any
11 manner any information or item that is subject to this Stipulated Protective Order to any person or
12 entity except in strict compliance with the provisions of this Order.

13 I further agree to submit to the jurisdiction of the United States District Court for
14 the Northern District of California for the purpose of enforcing the terms of this Stipulated
15 Protective Order, even if such enforcement proceedings occur after termination of this action.

16 I hereby appoint _____ [print or type full name] of
17 _____ [print or type full address and telephone
18 number] as my California agent for service of process in connection with this action or any
19 proceedings related to enforcement of this Stipulated Protective Order.

20
21 Date: _____

22 City and State where sworn and signed: _____

23 Printed name: _____
24 [printed name]

25 Signature: _____
26 [signature]